No. 90-598

In The

Supreme Court of the United States

October Term, 1990

ROBERT L. MATTHEWS AND JAMES HARDISON,

Petitioners,

v.

ALAN DiBONA AND SCOTT GUNDLACH,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the broad free speech rights traditionally afforded adult college students by the First Amendment of the United States Constitution be curtailed by allowing campus administrators to censor the speech of adult students with the same discretion as secondary school administrators have to regulate the speech of minor children?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

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STATEMENT OF THE CASE

This petition for Writ of Certiorari follows a state appellate court's reversal of a summary judgment in favor of petitioners. The appellate court found that no clear record had yet been established in this matter and that there were material issues of fact remaining to be litigated. For those reasons, the case was remanded for

trial. The appellate court decision is clearly an interlocutory opinion, not subject to review by this Court.

This case involves the censorship of a play which was scheduled to be produced and performed by a college-level drama class at the Educational Cultural Complex ("ECC"), a branch of the San Diego Community College District.

Respondent Alan DiBona was scheduled to teach the Drama 250 class during the summer 1986 session. Respondent J. Scott Gundlach was a student enrolled in the class.

DiBona selected the play "Split Second" by Dennis McIntyre for the students to produce and perform. Importantly, ECC requires no formal approval or administrative review of plays selected for Drama 250. Further, no guidelines exist by which plays are to be selected or by which the content of a play is to be evaluated. ECC policy places selection of course materials solely within the instructor's discretion.

Shortly after the class began, petitioner Robert L. Matthews, President of ECC, told DiBona he had received some phone calls from local church elders who were upset by the subject matter and language of the play. Matthews, in an effort to avoid organized opposition, refused to allow "Split Second" to be performed.

DiBona raised the issue with petitioner James Hardison, Dean of Arts and Sciences at ECC. Hardison agreed with the decision to censor the play by cancellation of the drama class, noting that the decision was based on the sensitivity of the community to the subject matter.

The appellate court's decision was based, in part, on the unique chronology of facts involved in this case. The court's decision turned on these pivotal facts:

1.) No one in the ECC administration was the least bit interested in "Split Second" until petitioner Matthews received phone calls from community religious leaders complaining about the sensitive *content* and *subject matter* of the play;

2.) the administration interfered only *after* the class began instead of exercising its discretion at a point in time when it was possible to select different course material; and

3.) at the prodding of church leaders, the administration censored the play by cancelling the class, without any consideration of less restrictive alternatives.

Because extensive factual detail is included in the appellate court's opinion, it is not repeated here. (Petition for Writ of Certiorari, pp. 2a-11a).

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. Because No Final Judgment or Decree Has Been Rendered As Required by 28 U.S.C. Section 1257, The Court Does Not Have Jurisdiction to Review this Decision.

The court's jurisdiction to review decisions of state courts is codified at 28 U.S.C. §1257. Section 1257 requires that there be a final judgment or decree rendered by "the highest court of a State in which a decision can be had."

To be reviewable, the state court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). More importantly, section 1257 requires that there have been a definitive disposition of all legal and *factual* issues in the case. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948). When further proceedings in state court are contemplated, the case is generally not reviewable. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Further proceedings on remand provide a strong basis for finding a state court judgment nonfinal and thus nonreviewable, especially when cases are remanded for *trial*. *Laclede Gas Light Co. v. Public Service Comm.*, 304 U.S. 398 (1938). When proceedings on remand, such as a trial, will clarify the record and remove factual ambiguities, there is a compelling reason for concluding that a final judgment has not yet been rendered. *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981).

The Court has ruled that a state supreme court's order which reversed a trial court's order granting a motion to dismiss is not final. *Louisiana Navigation Co. v. Oyster Com. of Louisiana*, 226 U.S. 99 (1912). This case is in a similar procedural posture.

There is no final judgment to be reviewed. The appellate court merely reversed an order of summary judgment entered in favor of petitioners by the trial court. The

appellate court found there to be triable issues of fact to be litigated, specifically whether petitioners' actions abridged respondents' constitutional rights. (Opinion pp. 17a-18a.) By its decision, the appellate court has remanded this matter *to the trial court for trial* on the merits. In the meantime, the facts of this case are disputed and, as of this juncture, there has been no determination of fact by a trier of fact. Because the facts are contested and because respondents have not yet exercised their right to a trial on the merits, this petition is premature.

The legal issues presented by this case should not be resolved on a factual record in which there are genuine disputes on material factual issues. Petitioners' reasons for cancelling the Drama 250 class and thereby censoring the play must be determined before the Court can decide the constitutional issues such cancellation raises. Because of the procedural posture of this case, there have been no factual findings on this critical issue.

2. The State Appellate Court Decision Is In Accord With the Precedent Established By This Court.

In this case, the state appellate court held that college administrators cannot constitutionally censor a class play because of opposition to the contents of the play voiced by church leaders and the college administration.

In reaching its conclusion, the appellate court properly rejected petitioners' arguments in favor of vesting college administrators with the same broad discretion to regulate speech that is afforded to administrators of grade schools and high schools.

Any analysis of students' First Amendment rights necessarily involves drawing a distinction between government's interest in regulating speech directed to an audience of school children and the regulation of speech directed to an adult college audience or the public at large. Petitioners' arguments in favor of broad administrative discretion fail to acknowledge this distinction.

The Court has recognized the broad free speech rights of students on college campuses. It has recognized that college administrators cannot curtail the dissemination of ideas simply because certain facets of society find them objectionable. *Papish v. University of Missouri Curators*, 410 U.S. 667, 670 (1973). In *Papish*, the Court summarized the applicable law, stating:

> [T]he mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'

Id., 410 U.S. at 670. The Court held that a university violated a student's First Amendment rights when it disciplined her for distributing a campus newsletter containing offensive language and a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice. The Court held that the university did not legitimately exercise its authority because the discipline was the result of disapproval of the content of the newspaper. *Id.*, 410 U.S. at 670. The Court explained that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . . " *Id.* at 671. In addition, as this Court explained in *Healy v. James*, 408 U.S. 169 (1972), "[T]he precedents of this Court leave no room for the view

that . . . First Amendment protections should apply with less force on college campuses than in the community at large." *Id.*, 408 U.S. at 180.[1]

The unique facts of this case establish that petitioners censored "Split Second" because it was offensive to the college administration and certain members of the local religious community. This was a clear violation of respondents' constitutional rights as established by the Court in *Papish v. University of Missouri Curators* and *Healy v. James, supra.*

As the state appellate court aptly noted, this case presents a "classic illustration" of speech regulated because of the fear that it would cause an unpleasant disturbance. (Opinion, p. 20a) The ECC administrators were concerned only with "avoiding the discomfort and unpleasantness that always accompany" an unpopular or unorthodox point of view. (Opinion, pp. 20-21a, citing, *Tinker v. Des Moines School District*, 393 U.S. 503, 509 (1969).)

3. Because The Decision Of The State Appellate Court Is In Accord With Case Law Involving Collegiate Activities, There Is No Clear Conflict Requiring Supreme Court Resolution.

The Court recognized in *Tinker v. Des Moines School District, supra,* that students do not leave their rights to free expression at the schoolhouse gate. *Id.*, 393 U.S. at

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[1] The decisions of the California Supreme Court are also in accord. *Braxton v. Municipal Court* (1973) 10 Cal.3d 138 (content of speech presented on a college campus cannot be restricted because it offends the tastes of school administrators or the public.)

506. The rights of adult college students are even greater. *Nicholson v. Board of Educ., etc.*, 682 F.2d 858, 863 (9th Cir. 1982).

As noted earlier, the Court held unconstitutional disciplinary action taken against a student for distributing a campus newspaper, the *contents* of which offended school officials. *Papish v. University of Missouri Curators, supra,* 410 U.S. 667 at 671.

Other courts addressing the right to express controversial or unpopular opinions on college campuses are in accord with Supreme Court precedent finding broad free speech rights in this context. *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 (9th Cir. 1982) ("The activities of high school students may be more stringently reviewed than the conduct of college students."); *Brown v. Board of Regents,* 640 F.Supp. 674 (D.Neb. 1986) (Holding that college administrators could not constitutionally cancel the presentation of a controversial film at a college theater because of opposition to the film from a state senator and members of the public.)

Even case law cited by petitioners is in accord. Petitioners incorrectly cite the case of *Piarowski v. Illinois Community College,* 759 F.2d 625 (7th Cir. 1985) as support for constitutionally allowing a university to censor faculty-selected materials on the grounds of indecency. The *Piarowski* case, of course, *did not* deal at all with curriculum or class materials, but the display of an instructor's art work on a college campus. There is an important distinction between the facts of *Piarowski* and the facts of this case. In *Piarowski,* the college administration *did not censor* the work involved as petitioners imply. The work

was moved to a different location, but the university allowed it to be presented on campus. This was a critical point for the *Piarowski* court which assumed the college could not constitutionally prohibit the display of the art on campus. *Id.* at 630. In this case, in contrast to *Piarowski*, there was no attempt by the college administration to find a less restrictive alternative, although one was suggested. (Opinion, p. 26a, n. 14) Instead, the college completely silenced the drama class. Thus, *Piarowski* provides no support for petitioners' actions.

There is no conflict among lower court decisions to be resolved. The ruling which petitioners seek from the Court is entirely unprecedented in a collegiate setting on these or similar facts. No lower court has extended to college administrators the broad discretion of high school administrators to censor student speech established by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The petitioners fail to note another key factor in this case – student participation in Drama 250 is voluntary. The ECC was not forcing unwilling students to rehearse and perform a play offensive to them. Voluntariness is an important factor in determining whether school administrators have a right to proscribe the type of play students perform. (Opinion, p. 26a.) In *Bowman v. Bethel-Tate Bd. of Educ.*, 610 F.Supp. 577, 580 (D.Ohio 1985), vacated without op. 798 F.2d 468 (6th Cir. 1986), the court held the school board could not halt a school play on the basis of curriculum control where participation was voluntary. 610 F.Supp. at 580-581. The court reached its decision

even though the play was "part of the school's offerings of avenues of personal development" and a "necessary adjunct to the curriculum." *Id.* at 580.

The script of "Split Second" was circulated in advance of the start of class so students could decide whether they wished to audition. The class was not a mandatory course and no one was required to attend its production.

Petitioners also misconstrue the appellate decision as creating constitutional protection for DiBona's curriculum selection. (Petition for Writ of Certiorari, p. 25.) This is not the holding of the state appellate court. Petitioners then attempt to bolster their arguments against such a holding by citing and discussing cases dealing with curriculum-based disputes.[2] Constitutional protection of instructor-selected curriculum was never the issue in this case. The reason it has never been an issue is because the ECC set no curriculum for the Drama 250 class. In this case it is factually undisputed that there was neither a review procedure for course materials nor any requirement that such materials be reviewed or approved by any college official. Unlike the cases cited by petitioners, DiBona did not deviate from curricula or standards set by the educational institution. This is because the ECC never cared to set such standards for this course until after controversy arose. Discretion for selecting the play for Drama 250 was vested completely in DiBona.

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[2] Petitioners rely on *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989) and *Lovelace v. Southeastern Mass. University*, 793 F.2d 419 (1st Cir. 1986).

As the state appellate court points out, because this is a case involving instructor-selected curriculum materials (Opinion, p. 20a), "The materials cannot then be censored merely because they contain 'indecent' language or deal with 'offensive' topics." (Opinion, p. 26a).

Arguments relating to the permissible scope of review of course materials by a college administration are misdirected in this case because the facts simply do not present that issue. What is at stake in this case is:

> [T]he right to receive information and to be exposed to controversial ideas – a fundamental First Amendment right. If . . . [the play] can be banned by those opposed to [the] ideological theme, then a precedent is set for the removal of any such work.

Pratt v. Independent School District No. 831, Forest Lake, 670 F.2d 771, 779 (8th Cir. 1982).

The pivotal fact in this case was petitioner Matthews' clearly expressed desire to "avoid 'taking on' the religious community" as his reason for cancelling the play. Based on the factual chronology of this case, it is quite evident that the play was cancelled because of controversy – because some members of the community found "Split Second" to be in poor taste, objecting to its *subject matter*. This is clearly unconstitutional under any precedent articulated by this Court or the lower federal courts which have addressed this issue.

CONCLUSION

Petitioners are attempting to obtain a ruling which is not only unprecedented but unwarranted in a case where college students and college faculty are exercising their right to free expression. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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